147

(2)

No. 09-275

Supreme Court, U.S.
FILED

In The
Supreme Court of the United States

RODEL RODIS,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, SGT. JEFF BARRY, OFFICER MICHELLE LIDDICOET, and ALEX FAGAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS J. HERRERA
City Attorney
JOANNE HOEPER
Chief Trial Deputy
SCOTT D. WIENER
Counsel of Record
VINCE CHHABRIA
CHRISTINE VAN AKEN
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, California
94102-5408
Telephone: (415) 554-4283
Facsimile: (415) 554-3837

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
REASONS FOR DENYING THE PETITION	8
I. THE PETITION SEEKS CERTIORARI ON AN ISSUE THAT THE NINTH CIRCUIT DID NOT REACH	8
II. THE PETITION DOES NOT PRESENT A QUESTION WORTHY OF CERTIORARI AND INSTEAD MERELY ASKS THIS COURT TO CORRECT A PURPORTED ERROR BELOW	10
III. THE NINTH CIRCUIT CORRECTLY HELD THAT THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

City and County of San Francisco v. Rodis, 129 S. Ct. 1036 (2009) 6

Hunter v. Bryant, 502 U.S. 224 (1991) 11

Illinois v. Gates, 462 U.S. 213 (1983) 5

Pearson v. Callahan, 129 S. Ct. 808 (2009) ..... *passim*

United States v. Allison, 616 F.2d 779 (5th Cir. 1980) 14

United States v. Everett, 719 F.2d 1119 (11th Cir. 1983) 14

United States v. Hernandez, 825 F.2d 846 (5th Cir. 1987) 2, 13

FEDERAL STATUTE

18 U.S.C. section 472 8

42 U.S.C. section 1983 4

STATEMENT

On remand from this Court for reconsideration in light of *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Ninth Circuit ruled that Respondents Sergeant Jeff Barry and Officer Michelle Liddicoet were entitled to qualified immunity for their arrest of Petitioner Rodel Rodis. The Ninth Circuit correctly reasoned that at the time of the arrest, courts addressing probable cause in the counterfeiting context had validated arrests similar to this one, whereas no court had held that arrests like this one were illegal. As a result, the Ninth Circuit held that the purported illegality of this arrest was not clearly established and that the officers were therefore immune.

Petitioner identifies no circuit conflict, and makes no argument about the nationwide importance of the specific qualified immunity question addressed by the Ninth Circuit. Rather, he asks this Court to grant certiorari to correct what he believes was an erroneous application of the qualified immunity doctrine to the peculiar facts of his case. Although this question does not warrant the Court's review, the Ninth Circuit's ruling was clearly correct in any event.

Petitioner does not identify a single federal appellate decision in which an arrest remotely similar to his was held to violate the Fourth Amendment. He merely contends that the counterfeiting cases cited by the Ninth Circuit that found no Fourth Amendment violation were factually distinguishable. This misses the point. Although all probable cause cases are

distinguishable on their facts, the rule that has emerged from the prior counterfeiting cases cited by the Ninth Circuit is that "probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note." *United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987). In the face of such a rule, and in the absence of any case law contradicting it, the Ninth Circuit was compelled, under *Pearson*, to rule that the officers are entitled to qualified immunity.

* * *

1. On February 17, 2003, Petitioner Rodel Rodis attempted to make a purchase at a Walgreens drugstore in San Francisco with a $100 bill. The cashier suspected the bill was counterfeit because of its odd texture and reported her suspicion to the store manager. The manager, who handles multiple $100 bills every day, examined the bill, compared it to another $100 bill, observed that the bill lacked a magnetic strip and watermark, and therefore agreed with the clerk's suspicion that the bill was counterfeit. Pet. App. 3.

The manager then called 911 to summon the police and informed the 911 dispatcher that he suspected the bill was counterfeit. Several San Francisco police officers – including Sgt. Barry, Officer Liddicoet, Officer James Nguyen, and Officer Barbara Dullea – arrived at the scene in response to that dispatch. The officers arrested Rodis, basing probable cause on several facts. First, the officers independently examined

the bill by touching it and inspecting it visually. Second, the Walgreens employees, experienced in handling currency, communicated their suspicions about the genuineness of the bill. Officer Nguyen spoke with the manager and cashier, who expressed their belief that the bill was counterfeit. The cashier informed Officer Nguyen that Rodis had used the $100 bill to pay for a few small items. The manager told Officer Nguyen he had compared the bill to another $100 bill from the same year. Pet. App. 3.

A Walgreens employee had, prior to the officers' arrival, tested the bill with a counterfeit detector pen, and the pen suggested that the bill was not counterfeit. Pet. App. 3. However, during their investigation, the officers determined that the pen was not working properly. Specifically, Officer Nguyen used it on a folder, and the pen erroneously identified the folder as genuine U.S. currency as well. Pet. App. 3-4. Understandably, the officers therefore did not place much weight on the pen's results.

Based on these facts, the officers determined the bill likely was counterfeit and decided to investigate further by contacting the United States Secret Service for guidance. The San Francisco Police Department has access to a Secret Service hotline for such inquiries, and officers are trained to contact the Secret Service to confirm the authenticity or lack thereof of suspect bills.

The officers conducted this portion of their investigation from the police station. Conducting such

an investigation at the Walgreens store was impractical because the Walgreens office was very small and cramped. In addition, conducting the investigation at the police station would be more effective and less embarrassing for Rodis, given the potential delay in hearing back from the Secret Service. Under standard procedures governing arrests, the officers handcuffed Rodis and transported him to the police station.

After arriving at the station, Officer Nguyen called and left a message for the Secret Service and received a return call from an agent twenty or thirty minutes later. After interviewing Officer Nguyen about the bill, the Secret Service agent informed Officer Nguyen that the bill likely was genuine. Upon learning this information, the officers immediately released Rodis, removed his handcuffs, and drove him back to the Walgreens store in the front seat of the police car. The officers returned the $100 bill to Rodis. The entire incident lasted approximately one hour. Pet. App. 4.

2. On October 1, 2003, Rodis filed suit in the Superior Court of California for the County of San Francisco, against Defendants City and County of San Francisco, then-Chief of Police Alex Fagan (in his official capacity only), Sergeant Barry, and Officer Liddicoet. The complaint alleged a cause of action under 42 U.S.C. section 1983, for violation of Rodis's Fourth Amendment rights, and state-law claims as well. After the City was served, it removed the case to the United States District Court for the Northern District of California. Pet. App. 4-5.

3. The officers and the City moved for summary judgment, and on March 22, 2005, the district court granted the motion in part and denied it in part. Pertinent here, the district court held that Rodis had a viable claim against the individual officers for violation of his rights under the Fourth Amendment and further held that those rights were clearly established at the time of the arrest. The district court thus denied the officers' request for qualified immunity. Pet. App. 14-30.

4. The officers appealed the denial of qualified immunity, and on August 28, 2007, a divided three-judge panel of the Ninth Circuit affirmed the denial of qualified immunity. Pet. App. 31-62. The panel relied on the lack of evidence of Rodis's intent to defraud above and beyond his passing of the suspect bill and concluded that without such evidence, the arrest was illegal and the illegality was clearly established.

5. The officers then petitioned for certiorari. Among other grounds, they argued that the Ninth Circuit had misapplied the doctrine of qualified immunity. They relied on the absence of any case law holding that to have probable cause to arrest, police officers were required to have evidence of intent to defraud above and beyond the passing of the suspect currency. To the contrary, various cases had held that such additional evidence of intent was not required to support probable cause. The officers reasoned, among other things, that the Ninth Circuit's opinion had created a circuit split concerning whether evidence of

intent was required to create probable cause for counterfeit offenses, and therefore that the officers could not be said to have violated clearly established law.

6. On January 26, 2009, this Court granted certiorari, vacated the Ninth Circuit's decision, and remanded the case for reconsideration in light of *Pearson. City and County of San Francisco v. Rodis*, 129 S. Ct. 1036 (2009). In *Pearson*, the Court reversed the Tenth Circuit and found that police officers were entitled to qualified immunity where they relied on the consent-once-removed doctrine to justify their warrantless entry into a home. *Pearson*, 129 S. Ct. at 823. At the time of the officers' entry, the consent-once-removed doctrine had been accepted in several circuits, had never been rejected, and had not been addressed by the Tenth Circuit. The Court reasoned that "where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct." *Id.* at 823.

7. On remand, the Ninth Circuit, per this Court's instruction, reconsidered its qualified immunity ruling in light of *Pearson*. The Ninth Circuit held that the officers were entitled to qualified immunity, as in *Pearson*, because existing case law on the issue supported the legality of the officers' actions whereas no case law defined those actions as illegal. Pet. App. 1-13. Rodis contended that to have probable cause, the officers needed to have evidence of intent to defraud above and beyond the passing of the

currency, whereas the officers contended that the passing of the suspect currency, without more, provided evidence of intent to defraud sufficient to justify an arrest. The court observed that it had never addressed this issue – *i.e.*, whether evidence of intent to defraud above and beyond the passing of the bill was required for probable cause to exist – and that the other circuits that had addressed the issue found that the passing of a counterfeit bill plus the identification of the person who passed the bill were sufficient to create probable cause.

The court relied on this Court's holding in *Pearson* that where other circuits have ruled in a particular way and where a ruling by the court would create a circuit split, qualified immunity applies. The court reasoned that however it ruled on the type of evidence required for probable cause, the ruling would either exonerate the officers or create a new rule and a circuit split that would entitle the officers to qualified immunity. Pet. App. 11-12.

Accordingly, the court declined to reach the issue of what level of evidence is required for probable cause and determined that the officers were immune in light of the evidence in the officers' possession that the bill was suspect. Pet. App. 11-12.

This petition ensued.

REASONS FOR DENYING THE PETITION

I. THE PETITION SEEKS CERTIORARI ON AN ISSUE THAT THE NINTH CIRCUIT DID NOT REACH.

The petition seeks certiorari on an issue that the Ninth Circuit did not decide, specifically, whether evidence of intent to defraud above and beyond the passing of the suspect bill is required to support probable cause for an arrest under section 472. The petition's first question presented for review asks

> Did the Ninth Circuit err in concluding that Respondent police officers, who admit they did nothing to determine Petitioner's intentions, did not have to do so because the mere act of passing a *suspected counterfeit bill*, by and of itself, furnish [sic] police with sufficient probable cause to arrest an individual pursuant to 18 U.S.C. § 472. . . .

However, the Ninth Circuit never reached the issue of what exactly is required to support probable cause for a counterfeiting arrest. Instead, the court followed this Court's approach in *Pearson*: it determined that the alleged illegality of the officers' actions was not clearly established, granted qualified immunity on that ground, and therefore declined to reach the underlying issue of whether the arrest lacked probable cause. Pet. App. 12 ("Because it is unnecessary to disposition of this case, we decline to decide this question.").

As a result, Rodis is asking the Court to grant certiorari on an issue that the Ninth Circuit did not

reach and was not required to reach to decide the case before it. Because the Ninth Circuit appropriately did not rule on the question of whether probable cause existed in this case and because there is no circuit conflict on this question – certiorari on this issue is unwarranted.[1]

---

[1] Rodis encourages this Court to grant certiorari because of the purported outrageousness of the arrest. The arrest, however, was not at all outrageous and, in fact, resulted from competent and standard police work. An experienced Walgreens manager called 911 to report the passing of a counterfeit bill – a large bill used to purchase small pharmacy items. The same manager informed the officers that in assessing the odd-looking bill – one without modern security features – he had compared it to a bill from the same year. The counterfeiting detection pen that the manager used was not functioning, given that it showed an officer's notebook to be genuine currency. And, the officers inspected the bill themselves and agreed that the bill was suspect.

Having formulated probable cause, the officers did what officers do: they arrested Rodis and transported him to the station. Rodis makes much of the transport, but there is nothing outrageous about transporting a person who is under arrest. Moreover, had the officers detained Rodis for an hour in public view at the Walgreens in Rodis's own neighborhood, Rodis would be expressing outrage that the officers had chosen to humiliate him by detaining him in a public place.

Rodis also emphasizes Sgt. Barry's alleged animus against him, but in doing so, he badly distorts the facts. Sergeant Barry was peripheral to the arrest. He and Officer Dullea stayed at the periphery throughout the process. Officers Liddicoet and Nguyen were the arresting officers, and it was their decision, not Sgt. Barry's, to arrest Rodis. Rodis himself acknowledged in deposition that Officer Liddicoet appeared to be in charge.

Nor does Sgt. Barry's previous disagreement with Rodis about City College's policy on guns affect the analysis. The

(Continued on following page)

II. THE PETITION DOES NOT PRESENT A QUESTION WORTHY OF CERTIORARI AND INSTEAD MERELY ASKS THIS COURT TO CORRECT A PURPORTED ERROR BELOW.

The petition identifies no circuit conflict on any issue. As discussed above, the Ninth Circuit created no conflict on whether evidence beyond the passing of a counterfeit note is necessary to establish probable cause to arrest, because the court did not decide that question. Nor does the petition identify any conflict on whether, in circumstances like these, the officers are entitled to qualified immunity. Instead, Rodis asks the Court to step in and review what he believes to be an erroneous application of the doctrine of qualified immunity to the peculiar facts of his case.

---

conversation at issue took place in 1996, seven years before the incident in this case. Sergeant Barry – a San Francisco voter – told Rodis that he disagreed with Rodis's position prohibiting campus police officers at City College from carrying guns. Sergeant Barry did not yell or make threats when he expressed this view. Rodis testified that he does not think that Sgt. Barry said anything inappropriate in expressing his view. Between this 1996 conversation and the 2003 incident, Rodis and Sgt. Barry had no contact whatsoever.

In light of this chronology and the appropriateness of Sgt. Barry, a San Francisco voter, expressing a legitimate view to Rodis, this conversation is irrelevant, and Rodis's assertion that Sgt. Barry was acting maliciously is baseless. Had Sgt. Barry wanted to hurt Rodis, he would have and could have participated in the arrest. He chose not to do so, and he allowed the arresting officers – Liddicoet and Nguyen – to make all decisions.

The petition goes on at length describing the various out-of-circuit cases that have addressed the issue of probable cause in the counterfeiting context. The petition criticizes the Ninth Circuit for issuing an opinion that is "relatively short" because "the panel did not review the factual contexts and totalities of the circumstances" of those cases. According to the petition, had the court done so, it would have seen that each of the cases contained facts supportive of Rodis's position regarding probable cause.

Even assuming that Rodis's interpretation of these cases is accurate – and it is not accurate – the most the petition argues is for the Court to step in and correct what Rodis considers to be a factual misinterpretation of the out-of-circuit cases and thus an erroneous conclusion that the alleged lack of probable cause was not clearly established. Whether or not Rodis is correct with respect to the Ninth Circuit's reading of specific cases, this is not the type of issue that warrants this Court's attention.

Similarly, Rodis's contention that the Ninth Circuit erred in applying the standard enunciated in *Hunter v. Bryant*, 502 U.S. 224, 229 (1991), is not worthy of certiorari. Rodis asserts that the Ninth Circuit analyzed the officers' conduct under the first *Hunter* prong – whether the officers were "plainly incompetent" – without considering the second prong – whether the officers "knowingly violate[d] the law." Pet. 25. According to Rodis, the officers knowingly violated the law in light of Sgt. Barry's supposed personal animus toward Rodis and Officer Nguyen's

alleged admission that he knew all along that the bill was valid. Rodis faults the Ninth Circuit for not considering this second prong and these facts. Yet, once again, this issue is no more than a contention that the Ninth Circuit erred in applying the correct test in a specific case. It does not warrant certiorari.

III. THE NINTH CIRCUIT CORRECTLY HELD THAT THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY.

The Court also should deny the petition because the Ninth Circuit's ruling was correct. Only through a distortion of the doctrine of qualified immunity is Rodis able to argue otherwise.

Rodis's qualified immunity argument is that because the cases cited by the Ninth Circuit on probable cause in the counterfeiting context are all "distinguishable" from this case – *i.e.*, all allegedly have stronger facts supporting probable cause than in this case – qualified immunity does not apply. Rodis analyzes each case at length and explains why each set of facts is stronger than the present case.

Setting aside the distortions in Rodis's lengthy compendium of these cases, Rodis's analysis is irrelevant to the qualified immunity issue. What matters is not whether cases finding probable cause are distinguishable from this case, but rather whether it was clearly established at the time of Rodis's arrest that the facts known to the officers were insufficient to create probable cause. Rodis has not come close to

making that showing. Indeed, the petition does not cite a single case in which a court found probable cause lacking for a counterfeiting arrest based on a dearth of evidence of intent to defraud, nor even a case in which the court found probable cause lacking on any ground.

Rodis's approach to qualified immunity – that it is defeated if no case squarely supports the legality of the officers' actions – turns the doctrine on its head. To defeat the officers' qualified immunity, Rodis must show that the purported illegality of the officers' conduct was clearly established at the time of the arrest. It is not enough for Rodis to assert (incorrectly, as it turns out) that the *legality* of the officers' conduct was not clearly established. Rather, he must show that the *illegality* was clearly established. *See Pearson*, 129 S. Ct. at 822.

Rodis does not even attempt to carry that burden. No case held, at the time of Rodis's arrest, that specific evidence of intent beyond the passing of a counterfeit note is required to create probable cause. To the contrary, various cases, including those cited by the Ninth Circuit and Rodis himself, held that all that is required to support a counterfeiting arrest is evidence that the bill is counterfeit and that the arrestee is the person who passed the bill. *See United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987) ("Generally, probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who

passed the note."); *United States v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983) ("While intent is an element of the crime which must be proved at trial, it is not necessary in order to establish probable cause to arrest. The passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note."); *United States v. Allison*, 616 F.2d 779, 782 (5th Cir. 1980) ("Although mere possession of counterfeit money is not a crime, when possession is coupled with reliable information that the possessor has attempted to pass the bill as genuine, the officer in the field is justified in concluding that an offense has been committed.").

Where cases have validated a particular kind of law enforcement action and where no cases have found it illegal, qualified immunity protects officers from liability:

> When the entry at issue here occurred in 2002, the "consent-once-removed" doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. . . . It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. . . . The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, . . . and prior to the Tenth

> Circuit's decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions.

Pearson, 129 S. Ct. at 822-23.[2]

The Ninth Circuit correctly ruled that based on the law as it existed at the time of the arrest (and as it exists today), the alleged illegality of the officers' action was not clearly established. As a result, even if the Court were inclined to take up Rodis's invitation

---

[2] Rodis criticizes the Ninth Circuit for failing to cite any cases in which the suspicious bills turned out to be valid or cases concerning upstanding citizens like Rodis. Pet. 23-24. This argument lacks merit, given the irrelevance to the probable cause inquiry about whether the officers ended up being mistaken and the extreme irrelevance of the social standing of the suspect.

Rodis even goes so far as to suggest that to have probable cause to arrest for passing a counterfeit bill, the bill at issue must be "confirmed" as counterfeit, not merely "suspected." Pet. 32. This argument contradicts basic concepts of probable cause. Probable cause does not require that elements of a crime be established. Rather, it focuses on probabilities. *See Illinois v. Gates*, 462 U.S. 213, 235 (1983).

to engage in error correction, the Court still should deny certiorari given the lack of any error below.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
JOANNE HOEPER
Chief Trial Deputy
SCOTT D. WIENER
Counsel of Record
VINCE CHHABRIA
CHRISTINE VAN AKEN
Deputy City Attorneys

Counsel for Respondents